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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 583

TOMLINSON FLEET CORPORATION,
Petitioner,

vs.

HAROLD A. HERBST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

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NOTE.

The question of liability for "transitory" unseaworthiness and "operating" negligence in seamen's injury and death cases presented in this case are apparently before the Court in the case of *The Trawler Racer vs. Mitchell* in which certiorari has recently been granted. We invite attention to the circumstance, so that in the event of the granting of the within petition the Court might wish to have the cases argued together.

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OPINIONS BELOW.

The District Court for the Northern District of Ohio rendered no opinion.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 268 Fed. 2d 642, and is set forth in the Appendix hereto at page 11.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 27, 1959 and is appended to this petition at page 19.

A motion for rehearing was denied on October 29, 1959, and copy of the ruling is appended hereto at page 19. The jurisdiction of this Court is invoked under 46 U. S. C. A. Sec. 688 and under the general maritime law.

QUESTIONS PRESENTED.

1. Does the presence on the step of a vessel's steel engine-room ladder of a foreign substance in which an assistant engineer allegedly slipped, establish either unseaworthiness or negligence when such foreign substance was unseen by the plaintiff on several previous trips over the ladder within a few hours prior to the fall resulting in slipping on said substance (31a); when said substance was not on the step when inspected by the chief engineer some twenty minutes prior to plaintiff's fall (53a, 54a); was not seen (but allegedly "felt") by the plaintiff at the time of the fall; no evidence of the presence of said substance could be found by the plaintiff upon his inspection of the step immediately after his fall (70a) and not a scintilla of evidence was adduced at trial to show the length of time the foreign substance had been on the ladder (31a), although the court below specifically affirmed the trial court's instruction to the effect that such showing was necessary to plaintiff's recovery?

2. Does a necessary temporary condition of "comparative" darkness in a vessel being restored to active service following a period of withdrawal therefrom, during which period her lighting system had been supplied with electric current from the shore, the "comparative" darkness being necessitated by the process of changing her supply of electricity from shore power to her own dynamos (16a, 18a), constitute negligence of her owner or unseaworthiness of the vessel in relation to an engineer officer who was injured in the process of eliminating the temporary darkened condition by restoring the ship's lights to operation which was a part of his duties?

The complaint contains four specifications of negligence, to-wit:

1. Failing to provide plaintiff with a safe place in which to perform his work.

2. In failing to make a timely inspection of said stairway and to remove the foreign and slippery substance therefrom.

3. In failing to have said stairway adequately illuminated, so as to disclose to plaintiff the presence of said foreign and slippery substance.

4. In permitting said stairway to become and remain in a slippery, dangerous and unseaworthy condition.

STATUTE INVOLVED:

The pertinent portion of the Merchant Marine Act of June 5, 1920, 46 U. S. C. A. is as follows:

"688. RECOVERY FOR INJURY TO OR DEATH OF SEAMAN. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Secs. 20, 38 Stat. 1185; June 5, 1920, c. 250, Secs. 33, 41 Stat. 1007.)"

STATEMENT.

This suit under the Jones Act and the general maritime law arises from injury sustained by an assistant engineer of the petitioner's steamer James Davidson who suffered a fall on an engineroom ladder on June 23, 1956, allegedly due to a darkened condition over a steel ladder (or stairway) on which was allegedly present a foreign substance. The basic facts which are not in dispute are as follows:

For a week prior to that date the vessel had been temporarily withdrawn from navigation at Superior, Wisconsin, awaiting conclusion of a strike in the steel industry. She was moored to the dock, without steam (13a). Her own power plant was consequently dead. Electricity was furnished from a nearby plant ashore (16a). At 8:00 o'clock A. M. June 23, 1956, the strike being concluded, preparations for restoring the ship to service were begun (13a, 14a). Among the steps necessary to that end was the transfer of the electric power from the shore plant to the vessel's own dynamo. By prearrangement the 1st assistant engineer was to pull the switch in the engineroom cutting off the shore power, then start the generator (17a). When the generator reached its full power the plaintiff was to descend the ladder to the deck level below, to start the auxiliary condenser upon signal from the 1st assistant engineer. (18a, 45a, 47a). The plaintiff fell on either the top or second step in the steel ladder—"ladder" being a stairway with hand rails on both sides (18a, 19a). However, he reached the condenser and started it when the 1st assistant called from the engineroom above (18a). His object in descending the ladder was to eliminate the temporary darkened condition (32a, and charge of court, 98a and 99a).

The suit was instituted by the plaintiff in the District

Court for the Northern District of Ohio and resulted in a jury verdict for $40,000 in favor of the plaintiff, upon which judgment was duly entered. On May 28, 1958 Judge Connell denied a motion for judgment N. O. V. or in the alternative for a new trial. On appeal the Court of Appeals affirmed, dealing only with the question of negligence, to the exclusion of the question of alleged unseaworthiness. Judge Miller wrote a vigorous dissent: The majority held that it might be inferred that an oiler was responsible for the presence of the alleged foreign substance by spilling oil.

REASONS FOR GRANTING THE WRIT.

The Foreign Substance.

Throughout the proceedings petitioner has studiously avoided any reference to disputed testimony. Important questions of maritime law are encompassed in the testimony of the sole fact witness—the plaintiff himself.

As indicating the sore need of an authoritative pronouncement on the questions presented, the trenchant language of Judge Wright in *Casbon vs. Stockard S. S. Corp.*, 173 Fed. Sup. 845 (April 1959), is illustrative of the existing confusion.

> "Moreover, there remain undecided questions concerning the application of the doctrine of transitory unseaworthiness or unseaworthiness caused by operating negligence * * *. Consequently, it is with some trepidation that a lower court proceeds in this changing climate to adumbrate the correlative duties and rights of shipowner and worker in this new twilight zone."

And Professors Gilmore and Black in their recent *The Law of Admiralty*, at page 329, add their testimony to the current state of indecision:

"Beyond Dixon, a host of other cases stand waiting for decision; conditions both of 'permanent' and 'transitory' unseaworthiness arising while the ship is on the high seas, the period during which the conditions are allowed to exist; how much notice (if any) and to whom, before liability exists."

We begin with the Court's pronouncement in *Boudoin vs. Lykes Bros.*, 348 U. S. at p. 350, where the question of unseaworthiness is held to be "one of degree."

That the presence, for an unknown length of time, of an invisible substance on a ship's ladder should not constitute either negligence or unseaworthiness would seem a fair deduction from the Court's expression.

The Ninth Circuit in *Johnson Line vs. Maloney*, 243 Fed. 2d 293, and *Pacific Far East Lines vs. Williams*, 234 Fed. 2d 378, holds the transitory doctrine no defense. The First, Second, Third and Fourth Circuits in *Miller vs. The Sultana*, 176 Fed. 2d 203 (a Great Lakes case); *Boyce vs. Seas Shipping Co.*, 152 Fed. 2d 658; *Shannon vs. Union Barge Line*, 194 Fed. 2d 584; *Cookingham vs. United States*, 184 Fed. 2d 213, Cer. den. 340 U. S. 935; *Ross Zealand*, 240 Fed. 2d 820, *Williams vs. Tidewater*, 227 Fed. 2d 791, cer. den., 350 U. S. 960; *Poignana vs. United States*, 225 Fed. 2d, 595; *Mitchell vs. Trawler Racer*, 265 Fed. 2d 426 (1959), hold directly to the contrary.

And to add to the conflict not only in the Circuits but among the District Courts, in the case at bar there is dissent in the Court below itself.

The "Comparative" Darkness.

The plaintiff himself testified as to the darkened condition that under the circumstances would exist for fifteen or twenty minutes during the process of shifting the current from shore to ship power (18a), and that when in-

jured he was on his way to lighten the darkness (32a). And the Court in its charge said (98a):

> "but if you will recall the gentleman (plaintiff) who was here said he was going down there to do something which had something to do with turning on the lights which weren't on."

In the first place plaintiff was fully aware of the darkened condition. He will hardly be heard to say that he relied upon seaworthiness if the darkness constituted unseaworthiness. In *Bruszewski vs. Isthmian S. S. Line*, 163 Fed. 2d 720, Cer. Den. 333 U. S. 828, it was held that:

> "liability for an unseaworthy vessel obtains only when the individual affected is entitled to and does rely upon seaworthiness of something actually unseaworthy."

Secondly, the law is well established that:

> "an employee cannot recover for injuries received while doing an act to eliminate the cause of the injury.
>
> *De La Penna vs. Moore-McCormack*, 84 Fed. Sup. 689.

This pronouncement merely follows *Byars vs. Moore McCormack*, 155 Fed. 2d 587:

> "The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe."
>
> "An employee cannot recover for injuries sustained while doing an act to eliminate the cause of the injury."
>
> *Mullins vs. Genesee, etc.*, 202 N. Y. 275;
> *Kowalsky vs. Conreco Co.*, 264 N. Y. 125.

The Departure From Established Procedure.

Has the court below so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision?

We fully understand that the correction of mistakes as such by the lower courts is not a function of this tribunal.

But in the case at bar, both the lower courts have virtually held that recovery may be had by a plaintiff without proof of negligence or unseaworthiness—surely a departure from the usual course of judicial proceedings.

The court below specifically approves the charge to the jury:

> "To recover damages on the ground of defendant's negligence, the plaintiff must here show that he slipped on a foreign substance which made the ladder or stairway slippery and that said substance had been present for a sufficient length of time to charge the defendant with knowledge of its presence or that if the lighting and illumination of the ladder was inadequate, such inadequacy had existed a sufficient length of time for the defendant to have had an opportunity to correct that condition."

Yet in the same breath the court below says "a reasonable inference could be drawn by the jury that this oiler had spilled oil on the steps." Not a scintilla of evidence was adduced to show that such had occurred. So if the oiler's negligence could be inferred, an inference as to the length of time the oil had been present would result in the well known inference upon an inference.

Even an "inference" must be more than a wild speculative guess.

Granted that the oiler had spilled oil, to establish negligence, on the Court's own holdings, a showing of the

length of time the oil had been on the ladder was a *sine qua non* to establish the defendant's liability. In the present posture of the case, negligence without fault has been fastened on the petitioner. Such is the present law in the Sixth Circuit.

As noted above, four specifications of negligence including (No. 4) unseaworthiness *the result of negligence* are contained in the complaint.

A *count* for unseaworthiness is conspicuously lacking.

Neither was an interrogatory on the question of seaworthiness submitted to the jury, nor is the subject dealt with in the opinion of the court below. The case to date contains nothing but the question of negligence.

Four interrogatories were submitted to the jury:

1. Was the defendant negligent toward the plaintiff? Answer—Yes.
2. If the answer to No. 1 is "Yes," in what manner was the defendant negligent? Answer—Defendant failed to thoroughly inspect the ship before ordering the men aboard.
3. Did the plaintiff slip on a foreign slippery substance on the ladder? Answer—Yes.
4. Was the ladder upon which plaintiff slipped sufficiently lighted? Answer—No.

The jury specifically pin-pointed the verdict upon the failure to inspect "before ordering the men aboard" (110a). But the Chief Engineer undisputedly inspected the ladder twenty minutes before plaintiff's fall (53a). And the inspection is admitted by plaintiff at page 11 of his brief where he says that:

> "The jury had a right of course, to accept the chief engineer's statement that he inspected the ladder twenty to thirty minutes before the accident."

The jury, with four specifications of negligence to choose from as charged by the trial court (99a), selected lack of inspection *the day before* the accident as their basis for a plaintiff's verdict. If an infinitesimal foreign substance could be detected on the ladder hours before the fall, *a fortiori* an inspection a matter of minutes prior thereto, as a matter of common sense, would be far more effective.

CONCLUSION.

To terminate the confusion existing in the courts below, as described in the above petition, we urge that it be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided July 27, 1959.)

Before MARTIN, Chief Judge; MILLER, Circuit Judge; BOYD, District Judge.

MARTIN, Chief Judge. This is an appeal by the Tomlinson Fleet Corporation from a judgment of $40,000, on the verdict of a jury, in favor of the individual appellee who was injured while serving as second-assistant engineer on the Steamer James Davidson, owned and operated by the appellant. Plaintiff-appellee had worked on the Tomlinson fleet during a number of years prior to the date of his injuries on July 23, 1956. For approximately a week prior to July 23, the lake-going steamer had been temporarily out of commission because of a strike in the steel industry. Without steam and with her power plant dead, she had been tied up at the dock in Superior, Wisconsin. Electricity for the ship was being furnished from a nearby plant on the shore.

When the strike was settled, the officers and crew engaged immediately in preparing the vessel for restored service. On the aforementioned date, after the banked fires in the ship's boilers had been shaken up, steam was available by nine o'clock, A. M., to disconnect the shore power and start the small dynamo in the engine room. Later in the morning, there was sufficient steam to disconnect the small dynamo and put the main generator into operation in the engine room.

Sharp conflict inheres in the testimony of the plaintiff-appellee on the one hand and that of the chief engineer and the first-assistant engineer on the other. The appellee

testified that, when he and the first-assistant engineer were in the main engine room, he was instructed by his superior officer: "As soon as I get the generator started, will you go down and start the auxiliary condenser." He swore further that the first-assistant engineer started the generator and, while it was running at full speed, called down to him to "start it up"—meaning for appellee to go down, start the condenser and then turn the steam from the auxiliary generator into the condenser. Herbst said that while this was taking place for some fifteen or twenty minutes, there was no electricity in the boat to light the bulbs above the stairway on which he fell. He testified, further, that, as he started down the stairway, he felt some slippery substance under his foot and slipped with such force that, although he had his hands on the railing, he "kept right on going" and "straddled" the hand railing where it curves and comes down to the side of the steps. He was not unconscious after he reached the bottom; but the pain he suffered as he tried to continue his duties quickly made him realize that he was severely injured.

The plaintiff-appellee stated that the place to which he was assigned for work was comparatively dark. He said that, as best he could remember, he slipped on the first step below the operating deck. Although the two witnesses introduced by the defendant-appellant contradicted the appellee, his testimony furnished substantial evidence that the stairway on which he fell was insufficiently lighted at the time of the accident. Likewise, his testimony furnished substantial evidence that there was a slippery substance on the stairway when he started down. He said that he "felt" the substance, although he did not see it. He stated, moreover, that there was an oiler on watch, on

the morning of the accident, whose duties required him to go up and down the steps upon which plaintiff-appellee fell. A reasonable inference could be drawn by the jury that this oiler had spilled oil on the steps.

The cause of action was brought by the plaintiff on two separate grounds, namely: (1) negligence under the Jones Act, U. S. C. A., Title 46, section 33; and (2) unseaworthiness of the vessel under the general maritime law in relation to the stairway or ladder where the accident occurred.

Four interrogatories were submitted to the jury. The following were the questions asked and the answers given by the jury:

"I. Was the defendant negligent toward the plaintiff? Answer—Yes."

"II. If the answer to No. I is 'Yes,' in what manner was the defendant negligent? Answer—Defendant failed to thoroughly inspect ship before ordering men aboard."

"III. Did the plaintiff slip on a foreign, slippery substance on the ladder? Answer—Yes."

"IV. Was the ladder upon which the plaintiff slipped sufficiently lighted? Answer—No."

The jury's answers to the foregoing interrogatories, which as has been shown were supported by substantial evidence, constitute plain findings that the defendant was guilty of actionable negligence.

It is really not material to affirmance of the judgment that this court should determine further whether the plaintiff established that the vessel was unseaworthy, although, apparently, the verdict of the jury was placed upon both negligence and unseaworthiness. The argument of the defendant-appellant that if unseaworthiness should be a

separate basis of recovery the plaintiff would have been required to plead it as a separate cause of action is rejected by *McAllister v. Magnolia Petroleum Company*, 357 U. S. 221, 224, 225: "But if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceeding. That is a consequence of this Court's decision in *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, which held that these claims were but alternative 'grounds' of recovery for a single cause of action."

We think the opinion of this court in *Chesapeake & Ohio Ry. Company v. Newman*, 243 F. (2d) 804 (C. A. 6) [brought under the Jones Act and tried by the same United States District Judge who tried the instant case], in which judgment for the plaintiff upon the verdict of a jury was affirmed, furnishes support for affirmance in the case at bar.

District Judge Connell instructed the jury clearly, correctly and adequately. He charged, *inter alia*: "To recover damages on the ground of defendant's negligence, the plaintiff must here show that he slipped on a foreign substance which made the ladder or stairway slippery and that said substance had been present for a sufficient length of time to charge the defendant with knowledge of its presence or that if the lighting and illumination of the ladder was inadequate, such inadequacy had existed a sufficient length of time for the defendant to have had an opportunity to correct that condition." This was a correct statement of law. It was unnecessary that the court should have embraced in its instructions, as requested by the defendant-appellant, the words "sufficient quantity" in relation to the foreign substance which made the ladder, or stairway, slippery. Quantity was not the test, but the correct issue was whether the substance on which plain-

tiff-appellee slipped was of such character that it actually caused his fall.

The trial court was not in error, in the circumstances of the case, in denying the motion of defendant for a directed verdict, or for judgment *non obstante veredicto*, or in the alternative for a new trial.

In *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 525, the Supreme Court said: "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases."

Johnson v. United States, 333 U. S. 46, 49, holds that the Jones Act, as amended, makes the standard of liability of the Federal Employers Liability Act applicable to suits by seamen for personal injuries suffered in the course of their employment, so that the shipowner becomes liable for injuries to a seaman resulting in whole or in part from the negligence of another employee. See also *Palermo v. Luchenbach S. S. Co.*, 355 U. S. 20; *The Law of Admiralty* (Gilmore and Black, 1957), page 312.

The judgment of the district court is affirmed.

No. 13,644.

MILLER, Circuit Judge, dissenting. I am not in agreement with the ruling of the majority opinion which affirms the judgment on the basis of negligence on the part of the appellant.

The ruling of the majority opinion is based upon the fact that in answer to interrogatory No. I, the jury found that the appellant was negligent, and upon the Court's conclusion that there was sufficient evidence to take to the jury the issue of whether there was a slippery substance on the stairway when the appellee started down and whether the stairway on which the appellee fell was insufficiently lighted at the time of the accident. The opinion thereupon concludes that the jury's answers to interrogatories No. III and No. IV, namely, that the appellee slipped upon a foreign, slippery substance on the ladder and that the ladder was not sufficiently lighted, must be accepted and support the finding of negligence.

I agree that the answers to interrogatories No. III and No. IV must be accepted on this review, but I do not agree that a ruling of actionable negligence can be based upon these findings.

I think the majority opinion is in error in construing these answers as a finding by the jury that the appellant was negligent *because* there was a foreign, slippery substance on the ladder or *because* the ladder was not sufficiently lighted. The jury did not find that negligence existed because of either of those reasons. On the contrary, it specifically found by its answer to interrogatory No. II that the appellant was negligent *because* it "failed to thoroughly inspect ship *before* ordering men aboard." (Emphasis added.) In explaining this interrogatory to the jury, the District Judge told the jury, "There you will

have to give whatever your answer would be, *whichever one of these four specifications of negligence* you thought had been proved, *whether it be one, whether it be all*, that would be the place in which you would answer if your answer to the first question is 'yes'." (Emphasis added.) The answer must necessarily be construed that the jury found negligence to exist for one reason, and that reason only, namely, failure to thoroughly inspect the ship before ordering the men aboard.

Liability based upon negligence cannot independently result from the jury's answers to interrogatory No. III that the appellee slipped upon a foreign, slippery substance on the ladder, or from its answer to interrogatory No. IV that the ladder was not sufficiently lighted.

The fact that the appellee slipped on a foreign, slippery substance on the ladder does not constitute actionable negligence. Other facts must also exist showing knowledge on the part of the appellant of the presence of the foreign substance, or reasonable opportunity to know about it. The jury was so instructed by the District Judge. The jury's answer to interrogatory No. II is a clear indication that it did not find these other facts to exist.

The fact that the ladder was not sufficiently lighted *at the time of the accident* does not by itself constitute actionable negligence. The vital question with respect to negligence as distinguished from unseaworthiness is *why* was it insufficiently lighted at that time. The evidence shows reasons why it was insufficiently lighted at the time of the accident. The isolated fact that it was not sufficiently lighted, without an additional finding that this condition was due to the fault of appellant, is not a finding of negligence.

I am accordingly of the opinion that the findings of fact by the jury in its answers to interrogatories No. III and

No. IV are relevant only to the issue of unseaworthiness, which was also an issue submitted to them, and that a ruling of actionable negligence cannot be based upon them.

With respect to the jury's answer to interrogatory No. II that appellant was negligent because it failed to thoroughly inspect ship *before* ordering men aboard, I find no evidence in the record whatsoever to support this finding. The evidence did not deal with the inspection of the boat before ordering the men aboard. I do not read the majority opinion as attempting to sustain that finding. With that finding set aside, answer to interrogatory No. I has nothing to support it, is inconsistent with interrogatory No. II, and a verdict cannot be based upon it. *Rule 49 (b), Rules of Civil Procedure; Missouri Pacific Railroad Co. v. Salazar,* 254 F. (2) 847, C. A. 5th. See also: *Welch v. Bauer,* 186 F. (2) 1002, C. A. 5th; *Golden North Airways v. Tanana Publishing Co.,* 218 F. (2) 612, 618, C. A. 9th.

Since the judgment of the District Court will necessarily be affirmed on the majority opinion's holding of actionable negligence, it is unnecessary to discuss appellant's contentions with respect to the issue of unseaworthiness.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed July 27, 1959.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING REHEARING.

(Filed October 29, 1959.)

The petition for rehearing is denied.

Judge Miller is of opinion that the petition should be granted for the reasons stated in his dissenting opinion filed in the case.

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JAN 22 1960
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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 583.

TOMLINSON FLEET CORPORATION,

Petitioner,

vs.

HAROLD A. HERBST,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

No. I.

Does the presence of a foreign slippery substance, on the step of an inadequately illuminated stairway, in the engine room of a vessel moored to a dock, constitute negligence under the Jones Act or unseaworthiness under the General Maritime Law, or both, if the slippery substance and the darkness caused respondent to slip and fall and sustain injury, as found by the jury in its general verdict, and in special findings of fact?

No. II.

Is the inadequacy of the illumination, in the area of the stairway, in any way affected by petitioner's disputed claims here, that the darkness was necessary, that it was temporary and that the injured officer was himself in the act of eliminating the dark, when such factual claims were rejected by the jury, as shown by its general verdict in favor of respondent and by its special finding of fact?

PRELIMINARY STATEMENT.

This is a civil action.

It was brought by respondent, Harold A. Herbst, against petitioner, Tomlinson Fleet Corporation, in the District Court at Cleveland, Ohio.

Respondent was employed by petitioner as a member of the crew of its Steamer, James Davidson, with the duties of a second assistant engineer.

Respondent sought recovery of damages, growing out of an accident at Superior, Wisconsin, on July 23, 1956, when he was injured aboard the vessel in the course of his employment.

His single cause of action was based upon two separate grounds for recovery. The first ground was for negligence, under Section 33, Title 46, commonly referred to as the Jones Act. The second ground was for the unseaworthiness of the stairway or ladder where the accident occurred, under the general maritime law of the United States.

Issues were joined under the pleadings.

Trial commenced at Cleveland, Ohio, on February 19, 1958, before the Honorable James C. Connell and a jury.

In response to written interrogatories submitted by the Court to the jury, at the request of the vessel owner, the jury made a special findings of fact, to-wit: that the vessel owner was guilty of negligence; that it was negligent in failing to thoroughly inspect the ship before ordering the men aboard; that respondent did slip on a foreign, slippery substance on the stairway; and, that the stairway upon which respondent slipped was insufficiently lighted.

At the conclusion of the trial, the jury returned a general verdict in favor of respondent.

Petitioner's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, was duly filed. It was subsequently overruled by the District Court.

An appeal was taken on June 3, 1958.

The judgment of the District Court was affirmed on appeal, by the Sixth Circuit Court, in a majority opinion, on the issue of the actionable negligence of the vessel owner under the Jones Act. The Court said, as to the issue of unseaworthiness:

> "It is really not material to the affirmance of the judgment that this Court should determine further whether the plaintiff established that the vessel was unseaworthy, *although, apparently, the verdict of the jury was placed upon both negligence and unseaworthiness.*" (Emphasis added.)

Judge Miller dissented on the issue of the vessel owner's liability for actionable negligence. He was of the opinion that the jury's special finding of fact, viz., that the vessel owner was negligent for not having inspected the vessel before ordering the men aboard, was unsupported by any particular evidence on that point in the record.

He said, as to the issue of unseaworthiness:

> "Since the judgment of the District Court will necessarily be affirmed on the majority opinion's holding of actionable negligence, it is unnecessary to discuss appellant's contentions with respect to the issue of unseaworthiness."

COUNTER STATEMENT OF THE FACTS.

The Steamer James Davidson.

The Steamer James Davidson was moored to a dock at Superior, Wisconsin for five days in July, 1956. This brief interruption in her navigation was due to the nation-wide steel strike.

Officers and crew members returned to the vessel on July 22. Full work in preparing the vessel to leave port for her first voyage, was under way on the early morning of July 23 (14a, 50a, 69a).

Insufficient Illumination Over the Stairway.

There was no steam in the ship's boilers during the five day period. It resulted that the ship's generator was not in operation and electricity for the ship's lights was supplied from a source ashore, through wires connected to the ship's switchboard in the engine-room.

At about 7:00 A. M. on July 23, the banked fires in the ship's boilers were shaken up. Steam became available as early as 9:00 A. M., to disconnect shore power and start the small dynamo in the engine-room (47a, 55a). There was enough steam available later in the morning to disconnect the small dynamo and put the main generator into operation in the engine-room (70a).

There were therefore two separate occasions on the morning of July 23, when it was necessary to disconnect one source of electricity and connect another source, at which times the lights aboard the vessel were out (55a, 70a).

The three fact witnesses in the case, viz., the respondent testifying for himself and the Chief Engineer and the first assistant engineer, testifying for the petitioner, were all in sharp disagreement with each other, as to when these interruptions in current occurred and how long they lasted.

Disagreement as to this was however, not of critical importance. The time and the circumstances of the respondent's accident were fixed with definiteness and certainty by other undisputed evidence, as will presently appear.

The first significant undisputed fact about the suspension of illumination from the ship's lights—whenever it occurred—was concededly caused by the positive affirmative act of the first assistant engineer, when he disconnected the shore electricity and connected the small

dynamo and at a later time, when he disconnected the small dynamo and connected the ship's main generator. No one else in the engine-room touched the switches (17a, 18a, 69a, 70a).

The second significant undisputed fact about the time of respondent's accident, in reference to the interruption of the electrical current, was fixed,—not to the minute or the hour—but by the admitted fact that the first assistant gave an order to respondent to go from the main engine-room to the lower engine-room, to turn on the auxiliary condensor, that to carry out this order, respondent was obliged to go down the stairway or ladder and that *at that particular time*, respondent fell on the darkened stairway and sustained injury (17a, 45a, 52a).

Respondent testified categorically that the lights were out and that the area was in semi-darkness, as he started to go down the stairway (18a, 32a, 46a, 47a, 48a). With this crucial fact thus established, the inference was permissible and compelling that the darkness was then and there caused by the affirmative, positive act of the first assistant engineer at the switchboard, who knew that respondent was, at that very time, using the stairway in obedience to the order which he had just given to respondent. The first assistant nevertheless carelessly plunged the stairway into semi-darkness, by what he did at the switchboard.

Petitioner's two fact witnesses, viz., the chief engineer and the first assistant engineer, both testified that, as respondent proceeded down the stairway to the lower engine-room, the lights were in fact on (53a, 70a). *They further said that the work of turning on the auxiliary condenser had nothing to do with the presence or absence of lights* (53a, 70a). (Emphasis added.)

From the foregoing disputed and undisputed evidence, offered by three witnesses, the first factual issue arose,—were the lights over the stairway on or off, as plaintiff started to descend the same?

The jury resolved this issue with a special finding of fact in answer to petitioner's interrogatory. The jury specially found that the stairway was in fact insufficiently lighted when respondent fell and was injured (110a).

The Foreign Slippery Substance on the Stairway.

The second crucial issue of fact was the presence of a foreign slippery substance on one of the top steps on the stairway and whether it caused respondent to slip and fall.

Respondent testified categorically as to the presence of a foreign slippery substance on the top step of the stairway which caused him to fall and sustain injury (18a, 19a).

He did not "see" it, for want of illumination (47a).

But he did "feel" it as he stepped upon it, and he was thus able to know that it was a foreign and slippery substance (28a, 31a, 48a).

The sudden, violent, feet in the air way, in which respondent slipped and fell down the stairway, his inability to save himself by grasping the handrailing, the force with which he struck the perpendicular railing at the foot of the stairway with his crotch, etc., were given by him as additional, persuasive, circumstantial evidence as to the slippery character and the quantity of the foreign substance (18a, 19a).

The two fact witnesses called by petitioner, viz., the chief engineer and the first assistant engineer, did not witness the accident. Both denied the presence of a foreign slippery substance on the stairway (53a, 70a).

Petitioner's Oilers Were Not Called by Petitioner As Witnesses.

Petitioner had at least one of the three oilers working in the engine-room and in the lower engine-room during the entire morning prior to the accident.

As the name implies, the oilers work was solely to handle the oil and grease required for the lubrication of machinery and other appliances in the engine-room and other places on the vessel. In doing his lubricating work, the oiler had to use the stairway upon which respondent was injured and he did so use it on the morning of the accident (12a, 29a, 64a, 74a).

Petitioner saw fit not to call any oiler in respect of oil and grease on the stairway and it offered no explanation for its failure to do so. *Petition of H. & H. Wheel Service Inc., etc.*, 219 F. 2d 904 (6 CCA-1955).

There thus arose, the second crucial issue of fact, viz., was there a foreign slippery substance on the stairway and did it cause respondent to slip and fall and sustain injury?

The jury determined that issue with a special finding of fact, in answer to an interrogatory submitted by the vessel owner. It answered both branches of the question in the affirmative (110a).

REASONS FOR DENYING THE PETITION FOR CERTIORARI.

I.

The Judgment Below Turned on Questions of Fact and the Jury Resolved Them Against Petitioner. The District Court and The Court of Appeals Approved the Jury's Determination of the Facts.

This Court said in *United States vs. Johnson*, 268 U. S. 220:

> "We do not grant certiorari to review evidence and discuss specific facts."

This policy of the Court on certiorari, has been reaffirmed by repeated statements, over many years.

The only exception to that policy, which we have found, has been in Federal Employers Liability Act and Jones Act cases, where four or more Justices have, on occasion, voted to grant certiorari.

That exception has been made, as we read the reported decisions, for two reasons.

The first reason is that these kind of cases differ from common law negligence cases because, under the Federal Employers Liability Act and the Jones Act, the employer is liable for any injury caused "in whole or in part" by its negligence and "in part" means "even the slightest part."

> *Rogers vs. Missouri Pac. R. R.*, 352 U. S. 500, 506 (1957).

The second reason is—and this has special importance in the matter at bar—that this Court has granted certiorari in a number of such cases, where it was necessary to do so in order to correct trespasses by the lower courts on the jury's prerogative, as the trier of the facts.

The most recent affirmance of the foregoing, is the decision in *Sentilles vs. Inter-Caribbean Shipping Corporation*, 361 U. S. 107 (November 23, 1959).

Reference also may be made in passing to the following earlier cases:

Tennant vs. Peoria & P. U. Ry., 321 U. S. 29, 35 (1944);

Lavender vs. Kurn, 327 U. S. 645 (1946);

Schultz vs. Pa. Ry. Co., 350 U. S. 523 (1956) and

Ringhiser vs. Chesapeake & Ohio Ry., 354 U. S. 90 (1957).

Having thus stated what we believe to be the Court's policy on certiorari, we next turn to a consideration of the case at bar, as it may be affected by that policy.

An examination of respondent's counter statement of facts, in comparison with those alleged by petitioner will make patently clear, we believe, that the controversy between the parties hereto was factual and nothing else.

There was no uniqueness in the way respondent was injured and there was no uniqueness in the principles of law applicable to the case.

Chesapeake & Ohio Ry. Co. v. Newman, 243 F. 2d 804 (C. A. 6).

Respondent sustained serious injury, when he fell down a stairway leading from the engine-room to the lower engine-room on the vessel on which he was employed, as the third assistant engineer.

The cause of his fall was a foreign slippery substance —probably a blob of grease—on the top step of the stairway. A contributing cause of his fall was the inadequate illumination in the area of the stairway.

That kind of *delict* by a vessel owner is responsible for more shipboard accidents than any other kind of cause

in the maritime industry. Support for this may be found in authoritative treatises on maritime law, where accidents are listed according to the manner in which they occurred. We refer to the following sources where thousands of decided cases are set forth:

The Law of Seamen (1952), Vol. II by Norris, Section 686 *et seq.*;
Benedict on Admiralty, Section 25 (6 Ed. 1940);
American Maritime Cases, Section "Personal Injury"—Five Year Digests.

As the evidence in the record abundantly discloses, there was substantial evidence submitted to the jury, to support respondent's claim that the vessel owner was guilty of actionable negligence under the Jones Act and of an unseaworthy stairway under the General Maritime Law.

The District Court gave the jury an excellent review of the significant and important evidence offered by both parties.

It also gave the jury an extraordinarily clear, accurate and perceptive explanation of applicable maritime law in the general charge (89a to 110a). Counsel for both parties were completely satisfied with the Court's charge and took no exception to any part of it.

The jury, in the exercise of its right to consider all the evidence, in the record as a whole, returned a general verdict for respondent and against the vessel owner.

And,—in addition to the general verdict—the jury returned special findings of fact, in response to interrogatories submitted by the Court, at the request of the vessel owner.

The jury specially found that the vessel owner was guilty of actionable negligence under the Jones Act, as explained to it by the District Court in the general charge.

It found that the vessel owner was negligent in failing to thoroughly inspect the ship before ordering the men aboard. It found that respondent did in fact slip and fall by reason of a foreign slippery substance on the stairway. It finally found that the stairway upon which respondent fell was insufficiently lighted.

The general verdict of the jury, and the jury's special findings of fact, received the approval of the District Court, when it overruled the vessel owner's motion for judgment notwithstanding the verdict, and its alternative motion for new trial.

The general verdict of the jury and the special findings received the approval of a majority of the Sixth Circuit Court of Appeals on the issue of actionable negligence. The Court found it unnecessary, therefore, to consider or decide liability based upon the claim of unseaworthiness.

One of the most recent definitions of unseaworthiness by this Court is to be found in *McAllister vs. Magnolia Petroleum Company*, 357 U. S. 221 (June 1958). Unseaworthiness is there said to be,

> "* * * the owner's failure to keep the vessel, its appliances and gear in that safe and sound condition, colloquially called 'ship shape' * * *"

It is hard to imagine a stairway on a vessel less "ship shape" than one with a foreign slippery substance on the top step, coupled with insufficient illumination in the area, as specially found by the jury in this case.

Mr. Justice Frankfurter wrote, in *Pope & Talbot vs. Hawn*, 346 U. S. 406, 418 (1953):

> "* * * it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."

We think it clear therefore, that, had the Sixth Circuit Court of Appeals found it necessary to consider and

decide the issue of unseaworthiness, in the light of the jury's special findings of fact, there can be no doubt that it would have unanimously affirmed the judgment of the lower court on that issue, notwithstanding a minority dissent on the issue of actionable negligence.

By reason of the foregoing, we respectfully submit that the petition for certiorari should be denied for the reasons (1) that the judgment below turns on questions of fact and (2) that the findings of the jury, as trier of the facts, should be upheld here, as they were in the lower courts.

II.

The Reasons Urged By Petitioner For Granting Certiorari Have No Merit.

(a) Petitioner's Factual Arguments.

The two questions which petitioner presents to this Court, as a basis for granting certiorari, on their face, actually present nothing more than factual arguments. They are plainly the factual arguments which were rejected by the jury and by the lower courts.

Petitioner first asks,—does the presence of a foreign slippery substance on the top step of a steep stairway constitute negligence under the Jones Act or unseaworthiness under the General Maritime Law if, as petitioner claims (1) plaintiff didn't see it (2) the chief engineer didn't see it (3) the plaintiff merely felt it (4) the plaintiff didn't see it on subsequent trips and (5) there was no evidence as to how long it was on the step?

To ask this question, as formulated by petitioner, is, we think, to answer it. It is obviously not the kind of situation which Rule 19 envisages.

Petitioner next asks—does the insufficient illumination in the area of the stairway constitute negligence or unseaworthiness if, as petitioner alleges, it was (1) necessary (2) temporary and (3) respondent was injured while in the act of correcting the darkness?

Again, we say, that petitioner has wholly misconceived the considerations which prompt this Court to exercise its discretion to review lower court proceedings.

As our counter statement of facts discloses, the contentions here made by petitioner were in sharp dispute in the District Court. Also, they were resolved by the jury in favor of respondent and against the vessel owner.

(b) Petitioner's Arguments on the Law.

Petitioner argues that there is due need for an authoritative pronouncement by this Court on the so called principle of transitory unseaworthiness, as based upon the divided opinion of the Third Circuit in the case of *Cookingham vs. United States,* 184 F. 2d 213 (1950).

The principle announced in the *Cookingham* case has been rejected in the Second and the Ninth Circuits.

> *Johnson Line vs. Maloney,* 243 F. 2d 293 (1957);
> *Poignant vs. U. S.,* 225 F. 2d 595.

It has been recently followed by the First Circuit in the case of *Mitchell vs. Trawler Racer Inc.,* 265 F. 2d 426. In this case, the First Circuit held, that if the unseaworthy condition arose *after the commencement of the voyage,* it was a transitory condition and some showing of negligence on the part of the vessel owner was a pre-requisite of liability.

It is respondent's answer to the foregoing that the doctrine of transitory unseaworthiness—whether it ultimately be upheld or rejected by this Court—is of no relevancy on the facts of this case.

The District Court here charged the jury explicitly as follows:

> "To recover damages on the ground of defendant's negligence, the plaintiff must here show that he slipped on a foreign substance which made the ladder or stairway slippery and that said substance had been present for a sufficient length of time to charge the defendant with knowledge of its presence or, that if the lighting and illumination of the ladder was inadequate such inadequacy had existed a sufficient length of time for the defendant to have had an opportunity to correct that condition."

The Court of Appeals quoted the above portion of the District Court's general charge and said:

> "This was a correct statement of the law." (Petition-Appendix, page 14.)

The sole inquiry therefore is—was there probative evidence in the record on the "sufficient length of time" issue?

It is respondent's contention that there was substantial evidence in the record on this issue of fact.

The vessel owner's three oilers had been on watch from seven o'clock on the morning of the accident, up until the time the accident occurred.

They had been carrying their oil and grease up and down the stairway where respondent fell, throughout the morning.

The vessel owner saw fit not to put any of the oilers on the witness stand nor to offer any explanation for its failure to do so.

The Court of Appeals first noted that:

> "Sharp conflict inheres in the testimony of the plaintiff-appellee on the one hand and that of the Chief Engineer and the first-assistant engineer on the other."

However, after reviewing the salient testimony offered by the fact witnesses, the Court of Appeals concluded:

> "A reasonable inference could be drawn by the jury that this oiler had spilled oil on the steps."

The time element in respect of insufficient illumination is less important.

There was evidence in the record to support respondent's claim that the first assistant engineer ordered respondent into the lower engine-room; and, that while using the stairway in carrying out the order, the first assistant, by a positive act on his part, plunged the stairway into darkness by throwing a switch.

We submit therefore, that in view of what has been said, the rule of transitory unseaworthiness, to the extent it requires some proof of sufficient time, has no application on the facts in the record of the case, because there was such evidence before the jury and because the jury presumably based its general verdict on it, pursuant to the Court's instruction.

The principle laid down by the First Circuit in *Mitchell vs. Trawler Racer Inc.* (*supra*), by which a distinction is made where the unseaworthy condition exists at the commencement of the voyage as against situations where it arises after the ship is on the high seas, is of no materiality in the case at bar.

It is undisputed that the Steamer Davidson was moored to a dock and that the officers and crew members were preparing her for her first voyage after temporary lay up, when the accident occurred.

We have therefore inital unseaworthiness in its traditional form, as found in the decided cases.

CONCLUSION.

We respectfully submit that, by reason of the foregoing, no special and important reason is presented by petitioner, whereby this Court, in the exercise of sound judicial discretion, should review this case on writ of certiorari.

On the contrary, we believe that good reason affirmatively is shown why this Court should adhere to the policy repeatedly stated by it over the years,—most recently in *Sentilles vs. Inter-Caribbean Shipping Corporation*, 361 U. S. 107—and again uphold the function of the jury, as the trier of the facts, in evaluating the evidence.

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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